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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

STANDARD OIL COMPANY, OF INDIANA,
Plaintiff in Error,

v.

THE STATE OF MISSOURI ON THE INFORMATION OF HERBERT S. HADLEY, ATTORNEY GENERAL, SUCCEEDED BY ELLIOTT W. MAJOR ET AL. — No. 47.

REPUBLIC OIL COMPANY,
Plaintiff in Error,

v.

THE STATE OF MISSOURI ON THE INFORMATION OF HERBERT S. HADLEY, ATTORNEY GENERAL, SUCCEEDED BY ELLIOTT W. MAJOR ET AL. — No. 48.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

ALFRED D. EDDY,
ROBERT W. STEWART,
FRANK HAGERMAN,
Attorneys for Plaintiffs in Error

John C. Rowell, Printer, 720 Dearborn Ave., Kansas City, Mo.

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STATEMENT.

1. *The Proceedings.*

These proceedings in error, upon behalf of the Standard Oil Company of Indiana and the Republic Oil Company, seek to reverse the judgment (Rec., 337-340) of the Supreme Court of

Missouri (Opinions, 218 Mo., 1-507; Rec., 340-444) in *quo warranto,* rendered in an original civil proceeding therein, not only unconditionally ousting them from the state, but also imposing upon each a fine of $50,000.

2. *Information.*

Original jurisdiction in *quo warranto* is by the constitution of the state (Art. 6, sec. 3) vested in the Supreme Court thereof. That action has, as was below decided, always, in Missouri, been regarded as a civil proceeding. It was instituted by the Attorney General filing an information (Rec., 6-10) in form civil, not criminal, against the Waters-Pierce Oil Company, a corporation organized under the laws of that state, the Standard Oil Company of Indiana, and the Republic Oil Company of New York, both the latter two having been authorized pursuant to the statute (Rev. Sts. Mo., Secs. 1024, 1025) to do business in Missouri, for the remainder of their chartered existence as fully as if they had been domestic corporations. The gravamen of the complaint was that the respondents had, in violation of the state law, entered into an illegal trust, pool and combination to fix and maintain the prices of the products of petroleum; the sole relief asked (Rec. 10) was that they be ousted from the exercise of their corporate rights and privileges under the laws of the state, and their licenses to do business therein be forfeited; nothing further was asked and no mention was made of a claim for a fine or other penalty.

3. *Answers.*

The answer of the Waters-Pierce Company (Rec., 27) was a general denial. That of the Standard Oil Company (Rec., 11-18) as well as that of the Republic Oil Company (Rec., 19-26)

consisted of: (a) specific denials of the averments of the information; (b) averments that certain sections of the state anti-trust statutes, sought to be enforced, were violative of certain provisions of the state and, in the respects hereinafter mentioned, of the federal constitution; and (c) that the action was an attempt to enforce the criminal features of that statute by original civil proceedings in the Supreme Court in violation of the fourteenth amendment, in that, if done, there would be accorded neither due process nor the equal protection of the law.

4. *Motion to strike.*

The state filed motions (Rec., 28-31) to strike from the answers the special matters pleaded therein. These motions and such special matters were, by stipulation (Rec., 32) withdrawn, without prejudice to thereafter assert the same. The answers were, however, thereafter permitted (Rec., 107) to be amended and such special matters were again (Rec., 108-123) pleaded exactly as they originally appeared.

5. *Orders appointing a commissioner to hear case.*

An order (Rec., 32) was made appointing Honorable Robert A. Anthony as commissioner to take the evidence and find the facts. It was evidently entered upon the theory that the case was civil in its nature, because in criminal cases the state constitution (Art. 2, Sec. 22) requires a trial by jury, and gave the defendant the right to meet the witnesses face to face. This order was afterwards amended (Rec., 124) by directing the commissioner not only to find the facts, but to report his conclusions of law and fixing the time within which exceptions to his report should be filed, whereby he practically became the same as a special

master in an equity case. Indeed he evidently was treated as one because Judge Woodson's opinion below referred to his report and its contents as "the incoming report of the master" (218 Mo., 339; Rec., 358), "the report of the master" (218 Mo., 462; Rec., 435) and "the conclusions reached by the master" (id).

6. *State's motion for production of witnesses.*

The state, obtained an *ex parte* order (Rec., 81-83) that the Republic Oil Company produce within Missouri, certain officers, books and papers, under a statute (Rev. Stat. of Mo., 1899, Sec. 8983-8984) which provided that for a failure so to do in a suit to enforce the anti-trust statute, but in no other, final judgment should be entered against the corporation. A motion (Rec., 84-85) was made to set aside the order because such a statute did not accord to the respondent due process or the equal protection of the law. In an elaborate opinion (194 Mo., 124; Rec., 77-101) the court below upheld the validity of the statute. Upon its hearing it appeared (Rec., 72-76) that depositions were being taken in New York which could not have been done had the case been criminal because respondents were entitled at the trial to be confronted by the witnesses against them (Const. Mo., Art. 6, Sec. 3). A motion for a rehearing (Rec., 103-105) was filed and (Rec., 105) overruled, after which a new order (Rec., 106-107) was made for the production of certain non-resident officers.

The contention of the company was that under *Hovey* v. *Elliott*, 167 U. S., 409, no state statute could be upheld which permitted judgment to be entered if the party failed to appear or answer and that such a statute could not single out and apply to one class of cases, and to none other. Since then, however, *Hammond Packing Co.* v. *Arkansas*, 212 U. S., 322, has been decided, upholding such legislation as against a foreign corporation. That

decision as well as the fact that there was, thereafter, a compliance with the order, probably eliminates from the case that which might otherwise have been here, as it was below, a serious and interesting question.

7. *Report of Commissioner and exceptions thereto.*

An elaborate report (Rec., 124-309) was filed by the commissioner, finding the respondents guilty. To this report each one of the respondents, in due time, filed exceptions (Rec., 309-335).

8. *Federal constitutional questions invoked and decided.*

(a) The answers of the Republic (Rec., 112-115) and of the Standard Oil companies (Rec. 120-123) presented these federal constitutional questions:

1st. The anti-trust statute prohibited the making of all arrangements restricting competition, whether reasonably, unreasonably, directly or indirectly restraining same, which was an unwarrantable interference with the constitutional right of all persons to make contracts.

2nd. That statute discriminated between the sellers and the purchasers of commodities, in that it applied only to those who made or sold commodities, but not to those who bought from them. It also discriminated between labor, capital and other interests on the one hand and the seller of commodities upon the other, in that it applied to the sale of commodities and to insurance premiums, but not to labor or other things which could be made the subject of a pool or combination.

3rd. That statute attempted to regulate interstate commerce in that it prevented contracts as to commodities used therein.

4th. Section 8972 impaired the contract made by permitting the Standard Oil Company to enter the state, interfered with the right of respondents to make contracts and denied the equal protection of the law in the attempt thereby to prevent, in case of ouster, any one from dealing in, within the state, *any* commodity, state or interstate, made by an ousted corporation, its successors or assigns, no such result being possible in the case of a partnership or individual engaged in the same business and found guilty of exactly the same offense.

5th. Sections 8983 and 8984 did not accord due process in requiring, under a penalty of a judgment for non-compliance, the production of its officers, books and papers within the state.

6th. The criminal features of the anti-trust statute were sought to be enforced in an original civil proceeding, in the court below, which could not take original jurisdiction in criminal cases, whereby there was accorded neither due process because there was no jurisdiction, nor the equal protection of the law in that co-partnerships and individuals doing the same business and guilty of the same offense could not be so proceeded against.

(b) These questions were again presented by requests (Rec., 293-295) to give certain declarations of law which were (Rec., 293), by the commissioner refused, again by exceptions to the report (Rec., 310-311; 320-321) and finally by petition for rehearing (Rec., 445-448, 451-452). The commissioner (Rec., 299-300) and the court (Rec., 375-387; 218 Mo., 1, 368-385) both fully considered and decided these questions against the respondents.

9. *Opinions and judgment of the court below.*

Upon the hearing, all exceptions were overruled in an elaborate opinion (218 Mo., 1-469; Rec., 340-437) by Judge Woodson. A concurring opinion (218 Mo., 470-473; Rec., 439-442) was filed by Judge Graves and a dissent (218 Mo., 474-478; Rec., 442-444) by Judge Lamm.

(a) The opinion of Judge Woodson was: The report of the commissioner should, upon the same reasoning and grounds stated in *U. S.* v. *Standard Oil Co.*, 173 Fed. Rep., 177; 221 U. S., 1, be confirmed as it clearly showed the respondents to be guilty; each of them should be fined $50,000 and ousted from the state, but the ouster against the Waters-Pierce Company should be suspended if, before a day fixed, it paid its fine and satisfactorily showed that it had ceased all connection with the other respondents. Judge Graves thought the punishment as to the Republic and Standard Companies was not sufficient, and that a substantial sum should be added as a fine, and that the judgment against the Waters-Pierce Company was excessive. It is, however, from the statements therein manifest that he wrote *his opinion* at a time when the majority of the court had concluded to simply oust all respondents but to impose no fines. Judge Lamm was of the opinion that the fine of the Waters-Pierce Company should be increased to $1,000,000, and that of the Standard Oil Company increased to an amount not named. He was, however, of opinion that the latter should not be ousted from the state.

(b) The report of the commissioner appeared (218 Mo., 65-339, Rec., 358) *in haec verba*, in Judge Woodson's opinion. It consisted of over 185 printed pages, and is set forth (Rec., 124-309) at one place in the record. So, in accordance with stipulation (Rec., 484-485) it was not reprinted as part of the opinion.

(c) Judgment (Rec., 337) was rendered against the Republic and Standard Oil companies, *first*, forfeiting, annulling and canceling their licenses to do business as foreign corporations and ousting them from all rights to further do business in the state, and, *second*, fining each of them $50,000. The same fine was imposed against the Waters-Pierce Company, but the ouster as against it was suspended if before a day fixed it paid its fine and ceased all connection with the other respondents, which conditions it accepted by resolutions (Rec., 457-458) of its directors and tendered to the court (Rec., 478) the amount of its fine.

The Attorney General thereafter, not being satisfied with the evidence offered as to this compliance with the judgment, moved (Rec., 459) to make the ouster absolute. The court, however, (Rec., 459, 478) overruled the motion, over the dissent of Judges Woodson and Lamm, approved (Rec., 478) the acceptance filed as a compliance with the decree and accepted the tender of the fine, thus taking the Waters-Pierce Company out of the case. Judge Woodson filed a separate opinion (Rec., 460-468) in support of his dissent but no other judge concurred therein.

10. *Petitions for rehearing.*

The Standard (Rec., 444-451) and Republic (Rec.,451-452) companies filed petitions for rehearing which were (Rec., 459) overruled, Judges Woodson and Lamm dissenting, although they specifically re-asserted the constitutional questions theretofore presented and others which, in form though not in substance, arose for the first time by the entry of the judgment of ouster, the sole relief asked, accompanied by fines in substantial sums.

11. *Retirement from the state of the Republic Oil Company.*

The report of the commissioner was filed (Rec., 124) upon May 24, 1907. Thereafter, upon June 22, 1907, before the cause was heard by the court, the Republic Oil Company filed (Rec., 336) with the secretary of state a statutory (Rev. Stat. Mo., 1899, sec. 1018) withdrawal from the state. The secretary received the paper but did not actually mark it filed because, as he certified, he desired the advice of the attorney general as to whether, in view of the litigation, it should be permitted to be formally filed. Prior to the hearing, (Rec., 335) which was (Rec., 337) upon October 23, 1907, a certified copy (Rec., 336-337) was filed with the court as a suggestion to it in abatement of the cause. It was, after a long discussion (218 Mo., 385-393, Rec., 387-392) held to be properly and in accordance with the practice, called to the attention of the court. It was also held that while it practically gave the state the entire relief for which the information asked so far as ouster was concerned, yet it did not prevent the court from also imposing a fine, for which purpose jurisdiction could be retained. This, the company claims, was an exercise of a power which only exists in a criminal case but never in a civil proceeding, and being directly contrary to the state constitutional and statutory provisions, vesting jurisdiction, it was thereby denied due process and the equal protection of the law accorded by the fourteenth amendment to the constitution.

12. *The anti-trust statute.*

(a) The violation of law found to exist was by the judgment (Rec., 337) expressly recited to be the acts of the state legislature approved March 24, 1877 (Laws of Mo. 1877), and April 2, 1891 (Laws of Missouri, 1891, p. 186) as embodied in Chapter 143 of the Revised Statutes of 1899 (Rev. Stat. Mo., 1899, Secs. 8965-8982). The reference to the act of 1877 was evidently a

mistake as the first anti-trust act was passed in 1889 (Laws Mo. 1889, p. 96; Rev. Stat. Mo. 1889, secs. 7319-7326).

These statutes as construed provided that:

There should be no combination or agreement by manufacturers, buyers or sellers to regulate or fix the price or limit the amount or quantity of articles of manufacture or merchandise or commodity or by insurance companies to fix the price of insurance (Sec., 8965-8978) and none such made tending to lessen full and free competition therein (Sec., 8966).

For a violation thereof there could be injunction in the lower state courts (Sec., 8979), a recovery therein of treble damages (Sec. 8981) by the party injured, the imposition in criminal prosecutions therein by the state of a fine of from $5.00 to $100.00 for each day's offense (Sec. 8968) while the trust continued and if the offender were a corporation, there could be a judgment of ouster by "*any* court of competent jurisdiction" (Sec. 8971).

The acts of March 19 and 20, 1907, (Laws of Mo. 1907, pp. 374-376; 377-382) repealed these provisions of the statute and enacted, in lieu thereof, new sections making provision, however, that the penalties theretofore accruing *under* the former law should not be affected thereby.

(b) The statutes of Missouri (Rev. Stat. 1899, Secs. 1024-1025) adopted from the acts of 1891 (Laws of Mo. 1891, p. 75) as amended in 1895 (Laws of Mo. 1895, p. 85), also provided that a foreign corporation, by filing a certified copy of its articles of incorporation and paying a certain tax upon its capital stock, could obtain a certificate to do business therein for the remainder of its corporate existence (Sec., 1025) if not in excess of the time for which life could be given to a domestic company. Upon obtaining such certificate such foreign corporation became subjected to all the liabilities, restrictions and duties imposed upon

domestic corporations of like character but could in the state exercise no greater powers (Sec. 1024). The Standard Oil Company was, under this law, admitted to Missouri (Report Rec., 269) upon January 21, 1897, while the license to the Republic Oil Company (Rec., 267) was granted July 8, 1901.

(c) The Act of March 24, 1897, (Laws of Mo. 1897, p. 208) amended the anti-trust laws of 1889 and 1891 by adding section 8972 (Rev. Sts. Mo. 1899) providing that in case there was a judgment of ouster against a corporation, then that no other person whatsoever could, in the state, sell, offer to sell or deal in, any article or commodity, made, produced and manufactured in whole or in part by that corporation. The section also expressly recited that such provisions were "hereby made applicable in all respects to the successors or assigns of any corporation" so ousted. The literal reading thereof was that if there be a judgment of ouster, that no person could, within the state, sell or deal in any commodity made by the ousted company or any one to whom it sold its plant. This is confiscation, nothing more, nothing less. Applied to an oil refinery, which can be used for no other purpose and, to the Standard Oil, it means much; for besides having been admitted to the state *prior* to the passage of the act, the undisputed evidence set forth in the commissioners' report (Moffett Report, Rec., 240-244; Crenshaw id., 254) showed that company had large investments in the state, the extent of which was forcibly described by Judge Lamm (218 Mo., 474-476; Rec., 442). Judge Woodson (218 Mo., 506; Rec., 445) enlarged upon the subject by saying that the company had from 1900 to 1907, after deducting six per cent annual interest upon its investment, made from its state business in Missouri, net profits in excess of $1,000,000. It clearly appeared (Report Rec., 241, 244, 254), that besides an investment in one large refinery of $1,250,000, the daily production of which was 1000 to 1200 barrels,

there were many costly marketing plants in the state from which there were annually marketed 8,500,000 gallons of oil. The unconstitutionality of this section was asserted below and the question will hereafter receive due consideration.

13. *Laws of Missouri as to Quo Warranto.*

(a) Quo warranto is a proceeding of which the Supreme Court of the state has original jurisdiction the state constitution (Art. 6, Sec. 3), providing that in addition to its appellate jurisdiction, it has power "to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other remedial writs and to hear and determine the same." It was, however, below expressly held to be a civil proceeding (Opinion, Rec., 361, 362, 367, 375; 218 Mo., 1, 334, 345, 353) in accordance with previous decisions. (*State ex inf.* v. *Vallins*, 140 Mo., 523, 525, 536; *State ex inf.* v. *Loan Co.*, 142 Mo., 325, 335, 336.)

(b) The court below not only so held but that tribunal, as well as the parties, during the course of the case, treated it as civil, not criminal, in at least three material ways: Thus, the information (Rec., 5-10) and process (Rec., 4-5) ordered and issued therein were civil in form, not criminal. So a commissioner was appointed to find the facts and state his conclusions of law as to the entire case (Rec., 32, 124) and depositions were taken (Rec., 71-76) in New York upon behalf of the state, whereas the state constitution (Art. 2, Sec. 12), required a criminal proceeding to be by a criminal indictment or information, the trial to be by jury and the defendant to be confronted by the witnesses at the trial.

(c) Section 539, (Rev. Stat. of Mo., 1899), provides that in other than criminal cases, there shall be but one form of action known as a civil action, Sections 4457-4462 provide for

proceedings in quo warranto in the circuit or nisi prius court but they have no relation to original proceedings in the Supreme Court (Opinion, Rec., 374, 218 Mo., 365).

(d) While at common law there was power to fine, yet the fine there was only nominal (*Ames* v. *Kansas*, 111 U. S., 449, 461). In Missouri, the statute (Rev. Stat., 1899, sections 4151, 4152), while continuing in force the common law expressly provides for the rejection of so much thereof as permitted any imposition of a fine in excess of $200, so that if at common law there was power, as in fact there was not, in any such proceeding to impose a fine of $50,000, such law never became effective in Missouri.

(e) The statute (Rev. Stat. Missouri, 1899, Sec. 2396) of the state defines a crime to be "*any* offense * * * for which punishment or fine or both may by law be inflicted." So that the court below in fining punished criminally.

14. *Disposition below of the federal questions involved.*

The commissioner (Rec., 299) and the court below (218 Mo., 368-385, Rec., 375-387), as to the federal constitutional questions, held:

(a) While the state anti-trust act in terms prohibited *all* contracts by certain persons, in restraint of trade, yet as was held here of the Sherman Act (*Standard Oil Co.* v. *U. S.*, 221, U. S., 1) it did not extend to reasonable arrangements not directly influencing competition. This construction of the statute, binding here, necessarily removes from the case (*Smiley* v. *Kansas*, 196 U. S., 447) the first objection below, that the statute unreasonably interfered with the right to contract.

(b) The different sections of the statute must be considered as a whole. When this was done, both buyers and sellers are within its prohibition. This construction, also binding here, removes from the case the question that there was an unreasonable discrimination as between buyers and sellers.

(c) The statute reached all persons making, buying or selling commodities, as well as those dealing in insurance premiums. It did not, however, prohibit agreements relating to labor which might as effectually restrain or restrict competition. This, however, was not an unreasonable discrimination but was justifiable classification, not express, but implied from omission.

(d) The statute could not constitutionally regulate interstate commerce therefore must be considered not to have done so. This should have put that question out of the case. The judgment was not, however, so restricted, and being for an unconditional ouster brought into effect Section 8972, preventing the sale in the state by the ousted corporation, its successor or assign, of any commodity made by either; this even though the article sold was one in interstate commerce.

(e) Section 8972, of that statute did not unreasonably impair or destroy contractual or property rights. The question, however, was only dealt with in glittering generalities, ignoring the specific objections made by the respondents.

(f) Sections 8983 and 8984 did not deny due process in requiring the production within the state of its officers, books and papers, a question since likewise decided here (*Hammond Packing Co.* v. *Arkansas*, 212 U. S., 322).

(g) The statutory criminal penalties of the anti-trust act were not sought to and could not be enforced in a civil proceeding. The court below, by constitution, was vested with original common

law jurisdiction, in a *civil* action only, to wrest by ouster, from any corporation violating any state law, the franchise given by the state and thus abused by the offender. The court, however, in addition to ousting, could, by virtue of the common law, in a *civil* case, also fine respondents in substantial sums. When the fine was thus imposed, it was not the exercise of any criminal power, no matter how large the amount, nor was it the enforcement of any fine or penalty provided for by the statute for its violation.

15 *Questions here involved.*

The Republic and Standard Companies bring the case here, by writs of error, claiming that the Supreme Court of Missouri erred in rendering judgment of ouster against each of them and at the same time imposing upon each of them a fine of $50,000. In that connection these questions arise and will be presented:

(a) The case was civil, not criminal; yet the court below in an exercise of original, not appellate, civil jurisdiction, entered a judgment of ouster, the sole relief claimed in the information, thereby exhausting its power in such an action, this too, after a repeal of the statute, a violation of which was the basis of the judgment. In addition thereto, it imposed a fine of $50,000. To thus fine was the exercise against a corporation of a power in a criminal action which, as was conceded, could not have been exercised against a partnership or individual. The court, as it conceded, was not vested with and could not entertain original criminal jurisdiction, wherefore there was accorded neither due process nor the equal protection of the law (Argument, Div., 1).

(b) The effect given to the judgment of ouster in Missouri by section 8972 (Rev. Stats. Mo., 1899), passed after the Standard Oil Company entered the state, and sections 8969 and 8975 (Laws Mo., 1907, pp. 379-380), was violative of the constitution in that no

one, not even a retail merchant, could, in the state, ever sell o
deal in any article, in state or interstate commerce, made by th
ousted company or one to whom it sold its plant (Argument Div
II).

(c) The judgment of ouster fails to exclude from its effe
interstate business, thus directly affecting interstate commer
which congress alone (Const. U. S., Art. 1., Sec. 8) can regulat
Moreover, under the literal terms of section 8972, after a corpor
tion is ousted, no person can in the state deal in *anything*, not eve
an article of interstate commerce, manufactured by it, its su
cessors or assigns, so that in this respect particularly, a gener
ouster interferes with interstate commerce (Argument Div. III

(d) The statute, because of a violation of which there w
an ouster, was before trial repealed, whereby there was no juri
diction and hence no due process of law (Argument Div. IV).

(e) The Republic Oil Company had, prior to the heari
below, withdrawn from the state. The court below conceded th
it could only exercise original jurisdiction in quo warranto a
that it had no power to enforce any criminal law. The office h
expired so there was nothing upon which the judgment of ous
could operate. The withdrawal of the company from the st
deprived the latter of nothing in the way of rights, unless a fi
could be, in the same proceeding, imposed (Argument Div.
subd. i).

(f) If there should be no absolute reversal of the jud
ment below, but some change therein, then this court shou
exercise its statutory power by making such modification
would do justice and yet conform to the decree entered in *Uni
States* v. *Standard Oil Company*, 173 Fed. Rep., 177, 221 U.
1, thus preventing, as to one vast property in a state, conflicti
directions from courts of different jurisdiction (Argument D
I, Subd. a-h).

SPECIFICATION OF ERRORS.

The questions thus arising are involved in the assignments of error (Rec., 479-481), but probably put them in more concrete form than they there appeared where they asserted that the court below erred:

"1. In denying to respondent the protection of the constitution of the United States and amendments thereto in each of the respects claimed in its amended answer and return, and also in its motion for rehearing.

2. The court held that this was a civil proceeding and that it had no criminal jurisdiction. It then, in addition to an ouster, adjudged that this respondent should pay a fine of $50,000. This fine was at least the exercise of criminal jurisdiction in an original proceeding which was beyond the court's power and jurisdiction. The court thereby takes from respondent its property without due process of law, discriminates against respondent, and refuses to accord to it the equal protection of the law, all of which is contrary to the 14th amendment to the constitution of the United States.

3. The judgment of ouster is also an exercise of power by way of original jurisdiction in a criminal cause in view of the forfeiture and penalties imposed by section 8972 (Revised Statutes, 1899) and sections 8969 and 8975 of the Laws of 1907. These sections and the judgment ordered impair the obligation of a contract, take property without due process of law, abridge the privileges of respondent and fail to accord to it the equal protection of the law, all contrary to the 14th amendment to the constitution of the United States and section 10 of article 1 of the said constitution.

4. Sections 8983, 8984 and 8985 were by this court upheld as constitutional, whereas respondent claimed and still claims that they violate the 14th amendment to the constitution of the United States in that they deny to it the equal protection of the law, abridge its privileges and immunities as a citizen and also deprive it of its property with-

out due process of law in that there was a threatened penalty of a judgment against it if it did not comply with the order.

5. Sections 8965, 8966, 8967, 8971, 8972 and 8978 were repealed by the laws of 1907, and after the institution of this suit new sections enacted in lieu thereof. It is true that the new law provides that the penalties incurred under the old law should not be affected. Inasmuch as the legislature cannot constitutionally grant to this court power to impose any forfeiture or fine, the reservation has, and can have, no application to proceedings pending here. Hence the statutes here enforced (Sections 8965, 8966, 8967, 8971 and 8978) have been repealed and to now enforce the same against respondent is to take its property without due process of law, abridge its privileges and immunities as a citizen and to deny to it the equal protection of the law, contrary to the provisions of the 14th amendment to the constitution of the United States.

6. The law as amended (Laws 1907, p. 377, et seq.) forbids an imposition of both a fine and a judgment of ouster or revocation of a license . The penalty is in the alternative. Such would be the relief as against others. Hence, when this court adjudged both a fine and a forfeiture, it denies to respondent the equal protection of the law and takes its property without due process of law, all contrary to the provisions of the 14th amendment to the constitution of the United States."

BRIEF OF ARGUMENT.

I.

A judgment of ouster, coupled with a fine of $50,000, did not accord due process or the equal protection of the law.

(a) *The cases below were civil, as distinguished from criminal.*

(1) The Constitution of Missouri, (Art. 6, Secs. 2, 3, 22, 31), provides:

"Sec. 2. The Supreme Court, except in cases otherwise directed by the Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under the restrictions and limitations in this Constitution provided.

Sec. 3. The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs, and to hear and determine the same.

Sec. 22. The circuit court shall have jurisdiction over all criminal cases not otherwise provided for by law; exclusive original jurisdiction in all civil cases not otherwise provided for; and such concurrent jurisdiction with and appellate jurisdiction from inferior tribunals and justices of the peace as is or may be provided by law. It shall hold its terms at such times and places in each county as may be by law directed; but at least two terms shall be held every year in each county.

Sec. 31. The General Assembly shall have no power to establish criminal courts, except in counties having a population exceeding fifty thousand."

(2) Under these provisions, it has been decided in Missouri that the jurisdiction of the Supreme Court in quo warranto is original, civil, as distinguished from criminal, and there is no criminal jurisdiction except such as is appellate. Upon this subject, the court below (218 Mo., 1, 344-345; opinion, Rec., 361, 362, 367, 375) spoke in no uncertain terms, emphasizing the rule previously recognized. (*State ex. inf.* v. *Vallins*, 140 Mo., 523, 535, 536; *State ex. inf.* v. *Loan Company*, 142 Mo., 325, 335, 336.) This doctrine accords with the decision here in *Ames* v. *Kansas*, 111 U. S., 449, 461, where there was an extended review of the entire subject under similar constitutional provisions and a like conclusion reached. This accords with section 539 (Rev. Sts. Mo., 1899) which provides:

> "Sec. 539. There shall be in this state but one form of action for the enforcement or protection of private rights, and redress or prevention of private wrongs, which shall be denominated a civil action; and the party thereto complaining shall be known as the plaintiff, and the adverse party as the defendant."

This section is part of the *civil* code which applies to quo warranto proceedings in the supreme court (*State ex inf. v. Vallins*, 142 Mo., 325, 335).

(3) The grant of jurisdiction being constitutional, the court below also held: Quo warranto lies as at common law to oust a corporation from its franchises for an abuse thereof; these actions were not and could not be to enforce any penalty given by the anti-trust statute, because the judgment was contrary to and in the face thereof and by a court not thereby authorized to act; the proceedings were simply to oust defendants from exercising their franchises to do business in the state, because, by a willful violation of the anti-trust statute, they had shown themselves unworthy of exercising the statutory privileges granted to them. No other

relief was asked by the pleader, the prayer therefor (Information, Rec., 10) being simply this:

> "Wherefore, your informant, prosecuting in this behalf for the State of Missouri, prays that the respondents, corporations, and each of them severally, be excluded from all corporate rights and privileges under the laws of the State of Missouri, and that their franchises, rights, authority, license and certificate to do business under the laws of the State of Missouri be declared forfeited, and that each and all of them be ousted from their several corporate franchises, privileges, license and authority to do business under the laws of this state."

It is, therefore, not too much to say that the informant neither asked nor expected a judgment of ouster and also a fine.

(b) *The cases, until judgment, proceeded upon the theory that they were wholly civil in their nature and no suggestion at any time was made by any one that the respondents could be fined.*

The state constitution, (Art. 2, Sec. 12) provided:

> "Sec 12. That no person shall, for felony, be proceeded against criminally otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; in all other cases, offenses shall be prosecuted criminally by indictment or information as concurrent remedies."

Hence, when a judgment was finally rendered against each respondent for an ouster and also for a fine of $50,000, there was a clear attempt to exercise the criminal power of a court of justice; this too by a court which had no *original criminal* jurisdiction in a proceeding *civil* in its nature, and upon an information which asked no relief of a criminal nature and none in the way of an imposition of a fine. Section 2396 (Rev. Sts. Mo., 1899) provides:

> "Sec. 2396. The terms 'crime,' 'offense,' and 'criminal offense,' when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted."

This statutory definition made the proceeding criminal. Besides it was in *Kansas City* v. *Clark*, 68 Mo., 588, said that "a crime is an act committed in violation of public law, (4 Black. Com. 5), a law co-extentive with the boundaries of the state which enacts it." So here (*Kentucky* v. *Denison*, 24 How., 66), it was said that "the word 'crime' of itself includes every offense from the highest to the lowest grade of offenses, and includes what are called misdemeanors as well as treason and felony."

(c) *The power to fine in a substantial sum did not exist at common law. Neither state statute nor constitution authorized it.*

The power of the Supreme Court of the state to fine in a *substantial* sum, while at the same time ousting the defendant from the exercise of its franchises, never existed by virtue of any state statute, nor by any provision in the state constitution. The anti-trust statute in force when the offense was committed (Rev. Sts. Mo., 1899, Sec. 8971) provided:

> "Sec. 8971. Any corporation created or organized by or under the laws of this state, which shall violate any provisions of the preceding sections of this article, shall thereby forfeit its corporate rights and franchises; and its corporate existence shall, upon proper proof being made thereof in any court of competent jurisdiction in this state, be by the court declared forfeited, void and of non-effect, and shall thereupon cease and determine; and any corporation created or organized by or under the laws of any other state or country, which shall violate any provisions of the preceding sections of this article, shall thereby forfeit its right and privilege thereafter to do any business in this state, and upon proper proof being made thereof in any court of competent jurisdiction in this state, its right and privilege to do business in this state shall be

declared forfeited; and in all proceedings to have such forfeiture declared, proof that any person who has been acting as the agent of such foreign corporation in transacting its business in this state has been, while acting as such agent, and in the name, behalf or interest of such foreign corporation, violating any provision of the preceding sections of this article, shall be received as *prima facie* proof of the act of the corporation itself; and it shall be the duty of the clerk of said court to certify the decree thereof to the secretary of state, and if it be an insurance company, also to the superintendent of the insurance department, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation. (Laws 1891, p. 186, amended, Laws 1895, p. 237.)"

This was repealed and a new section passed prior to the trial below (Laws of Mo., 1907, pp. 379, 380, Sec. 8971) which gave the power to the circuit court in the alternative. It could not do both for that section provided:

"Any corporation created or organized by or under the laws of this state which shall violate any of the provisions of this act may, upon proper proof being made thereof in any court of competent jurisdiction in this state, be declared by the court to have forfeited its corporate rights and franchises, and the same may by the court be declared forfeited, void and of non-effect, and shall thereupon cease and determine; and such court may, by such judgment and decree, also declare all or any part of the property of such corporation forfeited unto the state, *or in lieu of the forfeiture* of its corporate rights and franchises, *or in lieu of the forfeiture* of all or any part of the property of such corporation, assess against it a fine; and any corporation created or organized by or under the laws of any other state or country which shall violate any of the provisions of this act shall, upon proper proof being made thereof in any court of competent jurisdiction in this state, be declared by the court to have forfeited its right and privilege thereafter to do any business in this state, and the same shall by the court be declared forfeited, void and of non-effect, and shall thereupon cease and determine; and such court may, by judgment and decree, also declare all or any part of the property in this state of such corporation forfeited unto the state, or in lieu of the for-

feiture of its right and privilege to do business in this state, or in lieu of the forfeiture of all or any part of the property of such corporation, assess against it a fine; and in all proceedings for the violation of any of the provisions of this act against any corporation created or organized under the laws of this or any other state or country, proof of the act of any person who has been acting as the agent of such corporation in transacting its business in this state in the name, behalf or interest of such corporation shall be received as *prima facie* proof of the acts of the corporation itself; and it shall be the duty of the clerk of the court in which any judgment of forfeiture shall be rendered, as herein provided for, to certify the decree thereof to the secretary of state, and if it be an insurance company, also to the superintendent of the insurance department, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation; and in case any court shall render a decree forfeiting all or any part of the property of any corporation violating the provisions of this act, such court shall also appoint a receiver thereof to dispose of the same in such manner as the court may direct, and the net proceeds arising from the sale thereof shall be paid into the state treasury, as shall all fines that may be imposed against any person or corporation violating the provisions of this act be paid into the state treasury."

Theretofore the power to impose a fine had been exercised (*State ex rel.* v. *Armour Packing Co.*, 173 Mo., 356, 393) only as an incident to the judgment of ouster, i. e., the ouster was adjudged unless, as in the case of a remittitur of excessive damages, the defendant *voluntarily* elected to pay a sum of money called a fine. If the fine was not paid, it was neither due nor collectible, but the defendant was ousted of its franchises. In *State ex inf.* v. *Delmar Jockey Club*, 200 Mo., 34, 69, 74, Judge Graves, without authority to support him, attempted to demonstrate that the court could in quo warranto, without statutory authority, both fine and oust; but four of the seven judges refused (p. 77) to concur in this view, so an absolute judgment of ouster was entered, instead of an ouster and fine which was favored by

Judge Graves. It was upon the authority of that case, that the power to fine was in these cases assumed.

At common law, no fine in a *substantial* sum could be imposed. This was here said in *Ames* v. *Kansas,* 111 U. S., 449, 461. So the common law writers have expressed themselves. (3 Black. Com., 263; *The King* v. *Francis,* 2 T. R., 484; Bac. Ab., Title Information D; 2 Kyd on Corporations, 439.)

In Missouri the common law so far as it authorized a fine in any case in excess of $200 was never adopted, for sections 4151 and 4152 (Rev. Sts., 1899) provide:

> "Sec. 4151. The common law of England, and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the constitution of the United States, the constitution of this state, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any law, custom or usage to the contrary notwithstanding.
>
> Sec. 4152. Punishment by virtue of the common law shall in nowise be other than by fine or imprisonment, or both, and such fine shall not exceed one hundred dollars, and the term of such imprisonment shall not exceed two months; nor shall any of the British statutes for the punishment of crimes and misdemeanors be in force in this state."

It follows, therefore, that there was no power, by constitution, or statute or at common law, in the court below, to enter an absolute judgment of ouster, the sole and entire relief asked, and then add to it a criminal fine of $50,000.

(d) *The power not existing to both oust and substantially fine, the exercise thereof was not due process of law.*

The fourteenth amendment accords to the defendant the right to due process and the equal protection of the law. The respondents had paid the statutory tax upon their capital and were granted the right to do business in Missouri for the remainder of their corporate existence (Rev. Stat. Mo., 1899, secs. 1024.

1025), the same as if they were domestic corporations. To treat them, in a civil suit, *asking no such relief*, as criminals and fine each of them $50,000, by an exercise of original criminal jurisdiction, upon the court's own suggestion, after the submission of the case and when the judgment was entered, was not due process of law, because at the threshold to that protection is the question of jurisdiction. If that does not exist, there is no due process and so this court has repeatedly said (*Twining* v. *New Jersey*, 211 U. S., 78, 111; *Scott* v. *McNeal*, 154 U. S., 34, 46; *Bell* v. *Bell*, 181 U. S., 175, 178; *Andrews* v. *Andrews*, 188 U. S., 14).

So far as concerns the mere judgment of ouster, the equal protection of the law may, in this immediate respect, be said to have been accorded because any corporation could be likewise treated and such a judgment could not be made applicable to individuals. Such also is an appropriate judgment in quo warranto. Not so with a substantial fine of $50,000. There could be no reason for fining a corporation which would not apply to an individual. The fine was not asked for by the state but imposed by the court, upon its own volition, as if the inspiration first came to it when entering judgment seemingly (Rec., 441, 442) being driven thereto by Judge Graves' concurring suggestions. An individual or co-partnership engaged in exactly the same business and guilty of a like violation of law, could not, however, have been so fined in *any* original proceeding in the Supreme Court. Therefore, equal protection in the administration of the law was not accorded. The judgments in both cases are therefore erroneous upon the broad ground that the court below exercised the full limit of its power in a civil proceeding by ousting, the sole relief which the state asked. There was no power to add thereto the criminal punishment of a $50,000 fine, so that each respondent was ousted and at the same time fined in a substantial sum.

(e) The judgment of the court below did not therefore accord the equal protection of the law, because when rendered it was for both ouster and fine. This equal protection was not accorded for another reason. With other corporations proceeded against in the circuit court, for exactly the same offense, the judgment could only be in the alternative for while, as has just been contended, the mere coupling of the ouster with the fine failed to accord due process of law, still the failure becomes more pointed and apparent when the act of March 19, 1907 (Laws of Mo., 1907, pp. 379, 380, sec. 8971), is considered. That section was in force at the time of the decision below and has already been quoted. The power to oust and fine was in the alternative; both could not be exercised; the fine could only be imposed in lieu of an ouster. This section applies alone to *any* court though it will probably be contended that it is limited to proceedings in the circuit court, under the view below (*State ex inf.* v. *Loan Company*, 142 Mo., 329; opinion below, Rec., 362, 365, 366; 218 Mo., 349, 350) that all other penal provisions of the anti-trust statute must be treated as cumulative to the constitutional original civil jurisdiction of the Supreme Court. If that be the construction then the result is that a corporation abusing its franchise by a violation of the anti-trust statute, if proceeded against as here, in the Supreme Court, could be subjected to a judgment of ouster and the imposition of a heavy fine, so substantial, that at least two of the judges there, Lamm (Rec., 444) and Woodson (Rec., 477) each suggested making it $1,000,000; whereas if the proceeding had been under the statute, in the circuit court the judgment must have been in the alternative,—an ouster *or* a fine. Thus, corporations situated alike, for exactly the same offense, are treated differently, dependent upon which court takes jurisdiction, so that the equal protection of the law is not accorded.

(f) The discrimination in these respects is as pointed as that existing in the cases heretofore here decided. (*Gulf, etc.* v.

Ellis, 165 U. S., 150, 154; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S., 79; *Connelly* v. *Union Sewer Pipe Company*, 184 U. S., 540, 559; *Southern Ry. Co.* v. *Greene*, 216 U. S., 400).

(g) *The vice of the judgment below.*

A complaint of this character could probably not have been made of a judgment of ouster, suspensive in form (*State ex inf.* v. *Armour Packing Company*, 173 Mo., 356, 393), to become non-effective upon the *voluntary* performance of some subsequent corporate act. Such was the judgment below (Rec., 338, 339) against the Waters-Pierce Company. By a day fixed, that respondent voluntarily paid a fine of $50,000, and complied with the other conditions, upon the performance of which the ouster was suspended. So in *State ex inf. v. Armour Packing Company*, 173 Mo., 356, 393, each respondent avoided ouster by voluntarily paying a fine. So here had the judgments been for an ouster, but the enforcement suspended upon the payment of fines, respondents could then have decided whether they would voluntarily pay the fines, in order to avoid the forfeiture. The court in that event would not have unconditionally imposed fines. The vice in the judgments was, therefore, in adjudging an absolute forfeiture and then unconditionally adding thereto the impositon of fines of $50,000 each. It is apparent from what Judge Graves said (218 Mo., 471, 473; Rec., 441, 442), that a majority of the judges first entertained the opinion that a fine could not be imposed, but afterwards changed their minds (Rec., 436) upon the reasoning which he presented (Rec., 441, 442) in his concurring opinion. This view is emphasized by the thoughts expressed (Rec., 443, 444) in the dissent of Judge Lamm.

(h) *How the vice as to the Standard Oil Company can be cured.*

(1st) This, the highest court in the land, is empowered to do justice and thereby meet every emergency, and upon error enter

or direct the lower court to enter such judgment as it deems proper. The statute (Rev. Stat. U. S., 1878, Sec. 709), as here fully construed *Stanley* v. *Schwalby*, 162 U. S., 255, 279, 283, so recognizes by providing that upon writ of error to the state court, it can affirm, reverse or *modify* a judgment of a state court which is before it for review upon writ of error.

(2nd) The case of *U. S.* v. *Standard Oil Co.*, 173 Fed. Rep., 177, upon appeal, *Standard Oil Co.* v. *U. S.*, 221 U. S., 1, involved the question of whether there had been a violation of the Sherman anti-trust act by the Standard Oil form of organization and method of conducting business. The Sherman act does not, in substance, differ from the statutes of Missouri as construed below, further than that one applies to interstate and the other to state transactions. The same facts which adjudged guilt below were here held to establish guilt under the Sherman act. To prove the government's case, all the evidence offered below in the Missouri case was, in fact, offered therein; the same reasons for a decree and judgment were given by both state and federal courts. In the case under the Sherman act the defendants were given a fixed time in which to reorganize so as to avoid the consequences which now confront them. When the reorganization takes effect, the trust will be dissolved and the existing evils destroyed. As the organization in both cases made guilt, the reorganization will make clean. Hence if that reorganization takes place, as this court has heretofore decided would be proper, no objection can be made of a further violation of the state law by reason of the original reorganization.

(3rd) The large investments in Missouri are of great importance and entitled to serious consideration. The Standard Oil Company of Indiana, was wholly owned by the Standard Oil Company of New Jersey. Upon reorganization its stock will be distributed to the individual stockholders of that company. Not so with the Waters-Pierce Company. Large portions of that stock

(Opinion, Graves, J., 218 Mo., 1, Rec., 440, 441; Woodson, J., 218 Mo., 470, 407, 498, Rec., 436; Report 218 Mo., 394, Rec. 264) belong to outsiders having no connection with Standard Oil interests. The Standard Oil Company of Indiana (Ev. Moffett, Report, Rec., 240-244; Crenshaw, Rec., 254), has large investments in Missouri. Its refinery there cost $1,250,000. The extent of the investment was forcibly described by Judge Lamm in his opinion (218 Mo., 474, 476, Rec., 442) while Judge Woodson (218 Mo., 506, Rec., 445) enlarged upon the subject, at one time (Rec. 477) saying that the company had made from 1900 to 1907, after deducting 6% interest upon its investment, net profits from its business in Missouri, in excess of $1,000,000. The evidence (Rec., 241, 244, 254) not only showed $1,250,000 invested in a large refinery which each day produced from 1,000 to 1,200 barrels of refined oil, but many marketing plants in the state, with large investments, from which there were annually marketed 8,500,000 gallons of oil.

In case of absolute ouster, the consequences are fearful. If there be a literal construction and enforcement of sections 8972 (Rev. Stat. Mo., 1899), and of 8969 and 8975 (Laws of Mo., 1907, pp. 379, 380), the property becomes practically confiscated, and any person dealing therewith a felon. This subject hereafter (Infra. Div. II) will receive extended consideration.

(4th) There immediately occurs the thought whether it is possible to permit the company to remain in the state upon the same conditions that it is to be by this court permitted to there operate under the Sherman act. If that can be done, the fine imposed becomes of little importance. This result can be reached by a reversal of so much of the judgment as provides for a fine, and the modification of the ouster to the extent that it shall become effective and in force in case the respondent fails, within a fixed time, to reorganize its business in accordance with the de-

ree finally entered in *United States* v. *Standard Oil Company*, 173 Fed. Rep., 177, 211 U. S., 1, with the proviso that in case of uch reorganization within such time, the ouster shall not be enforced. Legally, there is no right to impose a fine, but should the court, in addition to such modification, also order that the fine imposed should, to avoid ouster, be paid, that requirement would be voluntarily met rather than take the consequences of being driven from the state. So much for the Standard Oil Company, so far s concerns the point now under consideration.

(i) *The judgment of ouster and a fine was clearly wrong as to the Republic Oil Company which voluntarily withdrew from he state. The action should, as to it, therefore, be simply abated t its costs.*

(1st) That which has just been said (Supra. Div. 1, subd.) applies only to the case of the Standard Oil Company, the ecord showing no reason for the Republic Oil Company to remain in or re-enter the state from which it has voluntarily withrawn.

(2nd) The commissioner's report was filed (Rec., 124) lay 24, 1907. Afterwards, upon June 11, 1907, the Republic il Company (Rec., 336), pursuant to and as expressly authorized y statute (Rev. Stats. Mo., 1899, Sec. 1018; opinion, Rec., 388, 18 Mo., 385-393) in due and proper form, presented to the secetary of state a formal withdrawal from the state. That section eads:

> "Sec. 1018: The president or secretary of every domestic incorporated company in this state, when it shall dissolve, and the principal officer of every foreign corporation when it shall retire from business in this state, is hereby required to file with the secretary of state an affidavit to that effect, and any failure to comply with the provisions of this section shall subject such company or the officers thereof to a penalty of from fifty to five hundred dollars, to be collected

as is provided for the collection of penalties and remuneration of prosecuting officers in section 1017 of this article. The mere retirement from business of a domestic corporation, without dissolution, shall not exempt it from the requirement to make reports under this article. The prosecuting attorneys in the various counties, to whom corporations are reported as having failed to comply with this act, when they shall be unable to find the officers of said corporations, or to secure service upon them for its violation, or when they shall ascertain that said corporations were dissolved before the passage of this act are hereby required to certify the fact to the secretary of state, separately as to each corporation, and such certificate shall be taken by the secretary of state as prima facie evidence that the corporation is defunct and out of existence for the purposes of the records of his office."

It could not thereafter have re-entered or remained in the state, if a party to a trust (Rev. Stats. Mo., 1899, Sec. 8973) nor unless a state officer granted it a license so to do (Id., 1024-1025). The withdrawal was below, upon October 15, 1907, (Rec., 335-336) spread upon the record. The trial was (Rec., 337) thereafter had upon October 23, 1907. The court below, held (Opinion Rec., 387-392, 218 Mo., 389) that this matter was, in accordance with the practice, properly presented. It also recognized that the failure of the secretary of state to mark the paper filed amounted to nothing, because under the statute all that was necessary for the corporation to do to accomplish the result was to present, for filing, the paper to the secretary. So the principle has been decided in Texas (*Holman* v. *Chevailler*, 14 Tex., 339). The court below, however, held that the withdrawal from the state only confessed part of that part of the relief which sought an ouster from the state, and in no wise answered the right of the state to have administered a punishment by a fine. This although no such relief was, by the information (Rec., 10) sought, and the court never thought of entering until it was confronted with the insistence of Judge Graves in (Rec., 441, 442) his concurring opinion.

(3rd) As shown by the authorities cited (Rec., 387, 218 Mo., 388-390) in Judge Woodson's opinion below, when this withdrawal was presented, all controversy as to the main issue disappeared, save and alone the question of costs. *In re Franklin Telegraph Co.*, 119 Mass., 449, was a case wherein it was held that where quo warranto was instituted for a misuse of power by a corporation in the execution of a lease, the cancellation of the lease prior to trial abated the proceeding as nothing but a moot case was left for decision. So in Alabama (*State* v. *Centerville Bridge Co.*, 18 Ala., 678-681, the state instituted proceedings to oust defendant from the exercise of its franchise, based on the non-compliance by it with a statutory requirement. Pending the litigation the legislature passed an act authorizing the assignee of the company to comply with the statute, provided that nothing therein contained should be so construed as to affect any suit pending in favor of or against said company. It was held that inasmuch as the limit of a judgment in quo warranto was a forfeiture of the franchise because of the non-compliance with the statute, the defect had been cured by the passage of the new law and nothing remained for the court to decide. Many other cases referred to below (Rec., 389; 218 Mo., 389) have been decided by the courts wherein quo warranto cases were abated because the terms of the offices in question had expired. The principle is that a controversy no longer existed, and the case had become moot.

(4th) The fact then remains that the Republic Oil Company having withdrawn from the state thereby gave to informant, in substance, the entire relief sought, which was (Information, Rec., 10) solely exclusion from the state. To thereafter retain the case and, without any claim for such relief, or intimation before judgment that it could be granted, adjudged against that company a fine of $50,000 was clearly the exercise of criminal jurisdiction in an original civil proceeding. Neither the common law, statute nor constitution so authorized. No pretense of a

right so to do was made, save and except that the constitution in giving original jurisdiction in quo warranto meant to give the remedy as it existed at common law. The utmost extent to which the common law has gone, as stated in *Ames* v. *Kansas*, 111 U. S., 449, 461, was to permit the imposition of a *nominal* fine. $50,000, with two judges asking to make it $1,000,000, was far from something nominal.

(5th) To impose a *substantial* fine in a confessedly *civil* proceeding does not accord due process of law, especially when a withdrawal from the state gave to the state all that was asked and all the court could give. Equal protection of the law was denied because no other class in the state could by any original proceeding in the Supreme Court be so criminally punished. There should therefore, as to this respondent, be a reversal of so much of the judgment as imposed a fine. That portion thereof which awarded the ouster should not be permitted to stand but in lieu thereof the action should as to the Republic Oil Company be, at its costs, abated, this upon the ground that there being nothing left to determine, the ouster was not due process.

II.

The effect of the judgment of ouster is confiscation under sections 8972 (Rev. Stats. of Mo. 1899) and 8969, 8975 (Laws of Mo. 1907, pp. 379, 380) whereby the obligation of a contract is impaired and the equal protection of the law denied.

(a) Section 8972 (Rev. Stat. of Mo., 1899) gives rise to another ground of complaint by the Standard Oil Company which has made large investments in Missouri, and will be much crippled

the literal enforcement thereof. Like complaint is made by Republic Oil Company. The constitutional validity of this tion was assailed by the answer (Rec., 114, 115, 123-124, par. by requests for the sixth declaration of law (Rec., 293) by ception 10 (Rec., 311, 321) to the master's report and by peti- n for a rehearing (Rec., 445-447, par. 1-5). Both the com- ssioner (Report, Rec., 299) and the court (Opinion, Rec., 375- 7; 218 Mo., 368-372, 377-378) denied the contention and dealt th the subject in glittering generalities making no distinction be- een the different sections, the validity of which was questioned.

(b) Sec. 8972 (Rev. Stats. of Mo., 1899) reads:

"That whenever the corporate rights and franchises of any corporation organized under the laws of this state have been declared forfeited by the judgment of a court of competent jurisdiction for any violation of the provisions of this article, and whenever the right and privilege of any corporation organized under the laws of any other state or country to do business in this state has been declared forfeited by the judgment of a court of competent jurisdiction for any violation of the provisions of this article, it shall thereafter be unlawful for any person, association of persons or corporation, to deal in, sell or offer for sale in this state any article, product or commodity made, produced or manufactured, in whole or in part, by any corporation whose rights, franchises or privileges have been so declared to be forfeited; and the foregoing provisions of this section are hereby made applicable in all respects to the successor or assigns of any corporation whose rights, franchises or privileges have been so forfeited. Any person violating the provisions of this section is hereby declared to be guilty of a felony, and upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding three years, or by imprisonment in the county jail for a term not exceeding one year, or by a fine not less than one hundred dollars nor more than one thousand dollars, or by both such fine and jail imprisonment: *Provided*, that no statement made by any person in any affidavit made under the provisions of sections 8973 and 8974 of this article shall be competent as evidence against such person in any criminal prosecutions brought under this section."

It was substituted by the Act of March 19, 1907, (Laws of Mo., 1907, pp. 379, 380, secs. 8969, 8975) which also made it a felony for any one to fail to comply with section 8972 as substituted by section 8975. These substituted sections thus read:

> "Section 8969. Any person violating any of the provisions of this act, or who shall do any act prohibited or declared unlawful by the provisions of this act, shall be adjudged guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment.
>
> Section 8975. That whenever the corporate rights and privileges of any corporation organized under the laws of this state shall have been declared forfeited by a judgment of a court of competent jurisdiction for any violation of the provisions of this act, and whenever the rights and privileges of any corporation organized under the laws of any other state or country to do business in this state, have been declared forfeited by a judgment of a court of competent jurisdiction for the violation of any of the provisions of this act it shall thereafter be unlawful for any person, corporation, or association of persons to deal in or offer for sale in this state any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or article or thing whatsoever, or contract of insurance against loss or damage by fire, lightning or storm, made, produced, manufactured or dealt in by any corporation whose rights, franchises or privileges have been so declared to be forfeited; and the foregoing provisions of this section are hereby made applicable in all respects to the successors or assigns of any corporations whose rights, franchises or privileges have been so declared to be forfeited."

(c) The *literal* reading of sections 8969, 8972 and 8975, as applied to the present situation, is this:

The Standard Oil Company having been ousted from the state "by the judgment of a court of competent jurisdiction," cannot itself, nor could its successors or assigns to whom it might

sell its plant, nor any retail merchant thereafter deal in, sell or offer to sell in Missouri, either as a state or interstate transaction, any article, product or commodity made, produced or manufactured by that company, or such successors and assigns, either within or without the state. Any such sale at once would make a felon out of the vendor even if he were one who purchased the plant of the company or a disinterested retail merchant who bought from one who by purchasing the plant had become a successor or assign of the former owner.

(d) The character and great extent of the business, and the enormity of the investment, fully appear in the evidence of President Moffett (Report, Rec., 240, 244) and General Manager Crenshaw (Rec., 254), were repeatedly mentioned by the commissioner (Rec., 269, 276, 299) and forcibly described by Judge Lamm (Rec., 442, 218 Mo., 474) as "vested interests in the state in a plant of great value and a great business in the useful line of refining oils." Judge Woodson (Rec., 425, 218 Mo., 447) said:

> "Their business has grown from almost nothing in 1878 to gigantic proportions. The Waters-Pierce Company has assets worth $12,000,000 and the name and good will of the concern is valued at about $35,000,000 and it is paying dividends of six or seven hundred per cent upon a capitalization of $400,000. It is clearly inferable from this record that the Indiana Company has fared equally as well, if not better, than the Waters-Pierce Company."

The same judge (Rec., 427, 218 Mo., 506) also said that the company had from 1900 to 1907, in Missouri alone, after deducting six per cent interest upon its investment, made net profits in excess of $1,000,000. About $1,250,000 was invested in a very large refinery which each day produced from 1,000 to 1,200 barrels of refined oil. (Evidence, Moffett Report, Rec., 241, 242; Crenshaw, Id., 254). Many marketing stations existed in the state with large

investments therein, from which there were annually sold 8,500,000 gallons of oil (Id.)

(e) *It needs no argument to demonstrate that these sections do not accord the equal protection of the law.*

Neither an offending corporation nor its successor or assign, to whom it may sell its plant, under the literal reading of the statute may in the state deal in a commodity made by it. No person, may, in the state, deal in any commodity made by such corporation, its successor or assign. Individuals and partnerships engaged in the same business and alike guilty of the same act and of a violation of the same statute, cannot be so punished. Their property receives no such blight. According to previous decisions here, such discrimination is too clear to admit of discussion. (*Gulf etc. Ry. Co.* v. *Ellis*, 165 U. S., 150, 154; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S., 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 559; *Southern Ry. Co.* v. *Greene*, 216 U. S., 400.)

So by this section an unusual punishment was inflicted which could not reach an individual or co-partnership as to whom there is in such case a discrimination. The state constitution (Art. 2, Sec. 4) provides:

> "Sec 4. That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails of its chief design."

Therein is protection to individuals. If section 8972 is given life this section of the state constitution becomes as to a corporation, a dead letter and thus equal protection is denied. Moreover, literally followed, the section denies freedom in making contracts

which under the constitution of the United States cannot be denied. (*Allgeyer* v. *Louisiana*, 165 U. S., 578, 589; *Holden* v. *Hardy*, 169 U. S., 366, 390; *Lochner* v. *New York*, 198 U. S., 45, 53; *Adair* v. *U. S.*, 208 U. S., 161, 172, 173.)

The statute is not one of exclusion; it applies alike to all corporations, domestic and foreign, and therefore cannot be upheld upon the ground of being a condition to a foreign corporation entering the state or remaining therein. (*Carroll* v. *Greenwich Insurance Co.*, 199 U. S., 401, 409.)

(f) So the constitution of the United States is a protection against the act of the state regardless of the form which it takes or method it is to pursue. It may be by judgment of a court or come into existence for the first time by the effect to be given to such judgment. (*Terre Haute etc. R. Co.* v. *Indiana*, 194 U. S., 579, 589; *Attorney General* v. *Lowry*, 199 U. S., 233, 239; *C. B. & Q. R. Co.* v. *Illinois*, 200 U. S., 561, 580; *West Chicago St. R. Co.* v. *Illinois*, 201 U. S., 506, 519, 520.)

Here the court below enforced its own penalty of ouster for an abuse of a corporate privilege. The statute then said that the effect of that judgment is to prevent the use of property and to restrict the right of contract. The result is that either the judgment of ouster should be reversed because of the effect thereof or else so modified as to expressly recite that the provisions of sections 8972 and 8975 should and could not be enforced because thereof.

III.

The judgment of ouster as entered and especially as it is to be enforced under sections 8972 (Rev. Stat. of Mo. 1899) and 8975 (Laws of Mo. 1907, p. 380), unwarrantably inter-

feres with the right to do interstate business and hence it violates Section 8, of Article 1, of the Constitution of the United States.

(a) The opinion of the court below (218 Mo., 1, 376, 377, Rec., 381, 382) concedes that the right of the defendants to do interstate business cannot be impaired or interfered with even if the state anti-trust law had been violated. The cases of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S., 1; *Pullman Company* v. *Kansas*, 216 U. S., 56, and *International Text Book Co.* v. *Pegg*, 217 U. S., 91, here recently decided, leave no doubt upon this subject.

(b) Turning then to the record it will be seen that the judgment (Rec., 338) recites that the license of the company is forfeited, annulled and cancelled, and the company is ousted of any and all rights, and franchises granted to it under the laws of the state, to further do business therein. As already seen, sections 8972 (Rev. Stat. of Mo., 1899) and 8975 (Laws of Mo., 1907, pp. 389, 390) provide that if in *any* court, whether supreme or circuit, there be a judgment of ouster, no one can, in Missouri, buy from the ousted company, its successor or assign, any article whatsoever which may have been made or produced by either. In other words, the Standard Oil Company cannot in Missouri sell, as an article of or in interstate business any article made at its refinery or elsewhere; or if it sells the refinery and marketing stations in Missouri, the purchaser thus becoming its successor or assign, cannot so sell.

The prohibition is also against any one, even a retail dealer, selling in the state if the commodity has been made even by the successor or assign of the ousted company. So, if the exact words used in the judgment should be construed not to apply to interstate business but only to a cancellation of the license to do a state business, still this section of the statute was one of those in the

article expressly mentioned in the judgment(Rec., 337) and is much broader with its penalties. These are visited upon *any* sale within the state, whether it be an interstate or a state transaction. Such a judgment of ouster should not be permitted to stand. There should have been added, as was done in a Texas case (*Waters-Pierce Oil Co.* v. *Texas*, 177 U. S., 28, 41), an express provision that nothing in the judgment should preclude the defendant, its successors or assigns, from dealing, in the state, in any article in interstate business.

(c) If, however, the language of the judgment is to be observed, it not only revokes the license, but also recites that the respondents are "hereby ousted of any and all rights accorded to them under the laws of this state from doing business in this state."

The constitution of the United States is a part of the law of Missouri. Under it there is the right to do an interstate business. By the act of the state the company was admitted there for the remainder of its corporate existence. Therefore, the judgment as it now stands may well be so construed as to cover state as well as interstate transactions. At least the possibility of such construction is sufficient to justify the necessity of its modification.

(d) It is apparent that the judgment of ouster as written should not stand against these objections. If not absolutely reversed, it should at least be modified. If any modification is made, it would not be unfair to add that, as already suggested (Supra. Div. 1, subd. h), any ouster should be suspended if, and whenever, there becomes effective the contemplated reorganization to meen the requirements made by the decree in *U. S.* v. *Standard Oil Company*, 173 Fed. Rep., 177, 221 U. S., 1.

IV.

The statute for the violation of which there was an ouster, was, prior to the trial repealed, and it was not due process of law to enforce it.

(a) The section for the violation of which judgment was rendered, was therein recited (Rec., 337), to be the act of March 24, 1877, and of April 2, 1891 (Laws of Mo., 1891, p. 186), appearing as sections 8965 and 8982 of chapter 143, of the Revised Statutes of Missouri of 1899. This reference to the act of 1877 was evidently a mistake, for the first anti-trust act was that of May 16, 1889 (Laws of Mo., 1889, p. 96), afterwards made sections 7319-7326 of the Revised Statutes of 1889.

(b) The acts of March 19th and 20th, 1907 (Laws of Mo., 1907, pp. 374, 377), repealed these former provisions by the first section of each providing:

> "Sections 8978, 8979, 8980, 8981 and 8982 of article II, chapter 143 of the Revised Statutes of 1899, are hereby repealed and certain new sections enacted in lieu thereof, to be known as sections 8978, 8979, 8980, 8981, 8982, 8982a and 8982b, which said new sections shall read as follows:" * * *
>
> "That sections 8965, 8966, 8967, 8968, 8969, 8970, 8971, 8972, 8973, 8974, 8975, 8976 and 8977, Revised Statutes of 1899, be repealed and there be enacted in lieu thereof certain new sections, to be known as sections 8965, 8966, 8967, 8968, 8969, 8970, 8971, 8972, 8973, 8974, 8975, 8976, 8977, 8977a, 8977b, and 8977c, which said new sections shall read as follows:" * * *

It is true that section 8977c of the second repealing act recites (pp. 381, 382) that the penalties incurred under the old laws should not be affected by this language:

> "The enactment and taking effect of this law shall not have the effect to release or extinguish any penalty, for-

feiture or liability incurred by any corporation or person on account of the violation of any law of this state prior to the taking effect of this act."

Inasmuch as the legislature could not constitutionally grant to the court below the power to impose any forfeiture or fine, as was stated in the opinion, this reservation had not, and cannot have, any application to proceedings pending in that court. In other words, there was being enforced by that tribunal the power granted to it at common law. The forfeitures, fines and penalties saved by the repealing act were those which existed by statute which the court expressly held could not be enforced by it. Therefore there was no saving of any penalties which the court below could, irrespective of statute, impose. Upon the repeal of the statute there could not have been there a judgment in quo warranto for a violation of its terms.

The case of *State* v. *Centerville Bridge Co.*, 18 Ala. 678,681, seems to be exactly in point. In that case the state instituted a proceeding to forfeit a franchise because of a non-compliance with the statute. Pending the litigation the legislature passed an act authorizing an assignee of the company to settle with the state, but provided that nothing therein contained should be construed as to affect any suit or suits then pending in favor of or against such company. The court held that when the legislature passed the new act, the result was to take away all grounds for quo warranto. Among other things it was by the court said:

> "Both plaintiff and defendant have united in vesting the subject matter of the controversy in a third person; the suit must therefore end, for further prosecution would be vain and fruitless. It is said in a suit to annul a title to an office will not be tried by quo warranto when at the time of the trial the term of office is expired. * * * We think the proviso was intended to apply only to suits brought by

the company against individuals or by individuals against the company. It could not have been the design of the legislature to give to Mayberry a privilege for the mere purpose of taking it from him by a suit then pending and without regard to any act of his."

The statute upon which the judgment rests, by its express terms having been repealed, it was not due process of law to permit the respondent to be ousted from the state for a violation thereof. The saving clause as to penalties had no reference to the powers of the Supreme Court. There was nothing left as a basis of quo warranto. A case or two will so illustrate. *In re Franklin Telegraph Co.*, 119 Mass., 449, was a proceeding in quo warranto to forfeit a franchise because of a non-compliance with the statute. Pending the litigation the lease was cancelled. The court dismissed the case because "the only injury alleged as a sufficient reason for the dissolution has therefore ceased to exist by the abrogation of the lease." So the cases cited (218 Mo., 389, Rec., 389, 390) below showed that the rule is almost universal, and is applied whenever the question becomes one of an abstract nature, like the expiration of the term of office which expires before the trial.

(c) This question is far from technical. The penalties imposed below were the result of an exercise by the court below of a power wholly independent of statute. It was a common law power vested by the constitution. The power was exercised because as the judgment (Rec., 337) expressly recites of a violation of a specific statute. Before judgment that statute was repealed, there was, therefore, (nothing upon which the exercise of such power could rest. There was for this reason no jurisdiction and hence no due process of law.

(d) If this view be sound it would result in a reversal of the entire judgment below.

V.

Judgment which should be entered here.

Finally to summarize the foregoing suggestions, these considerations are submitted as to the character of the judgment which should be entered here:

(a) If by reason of the repeal of the statute the violation of which was the basis of the jurisdiction (*Supra*, Div. 4) the court lost its power to oust, then there should be a reversal of the judgment and a dismissal of the proceedings.

(b) If as contended, (*Supra*, Div. 1, subd. a-g) there should not have been entered an ouster coupled with a fine, then there should be a reversal both as to the Standard and Republic Oil Companies.

This court has, however, power to modify a judgment. It could modify (Id. subd. h.) that against the Standard Oil Company by reversing the fine and providing that the ouster should not be enforced, if within a fixed time the business is reorganized in the manner required and contemplated as to interstate business in *Standard Oil Co.* v. *U. S.*, 221 U. S., 1.

(c) As to the Republic Oil Company this same modification could be made. But as it had before trial left the state and there was no power to fine, the simple method to adopt is to reverse and abate the action at its cost. (Id., subd., i.)

(d) If sections 8972 and 8975 are as contended (*Supra*, Div. II) invalid, then the judgment of ouster should be absolutely reversed because these sections give it an unconstitutional force; or else in addition to that already suggested there should be the further modification that the provisions of those sections should never be enforced because of the ouster herein adjudged.

(e) If the judgment of ouster as entered and as it is to be enforced, interferes with interstate commerce it should be reversed or else an addition to the modification suggested to meet the reorganization to be made in accordance with *United States* v. *Standard Oil Company*, 221 U. S., 1, there should be added a further modification to the effect that neither the ouster nor any effect thereof should apply to interstate business, but that the Standard Oil Company should have the free and absolute right in Missouri to use property in the manufacture and sale of its products for interstate shipment.

Respectfully submitted,

ALFRED D. EDDY,
ROBERT W. STEWART,
FRANK HAGERMAN,
Attorneys for Plaintiffs in Error